

2004

# State of Utah v. Michael Von Ferguson : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Debra M. Nelson; Vernice S. Trease; Salt Lake Legal Defender Association; Counsel for Appellee. J. Frederic Voros, Jr.; Assistant Utah Attorney General; Mark L. Shurtleff; Utah Attorney General; Counsel for Appellant.

---

## Recommended Citation

Brief of Appellee, *Utah v. Ferguson*, No. 20040077 (Utah Court of Appeals, 2004).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/4778](https://digitalcommons.law.byu.edu/byu_ca2/4778)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

UTAH COURT OF APPEALS  
BRIEF

STATE OF UTAH,  
  
Plaintiff/Appellant

:

:

v.

:

MICHAEL VON FERGUSON

:

Defendant/Appellee.

:

Case No. 20040077-CA

UTAH  
DOCUMENT  
KFU  
50  
A10  
DOCKET NO. 20040077-CA

---

**BRIEF OF APPELLEE**

The State is appealing an interlocutory order reducing a charge of violating a protective order, in violation of Utah Code Ann. § 76-5-108 (1999), from a third degree felony to a Class A misdemeanor in Third District Court in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, Judge, presiding. Appellee is incarcerated.

DEBRA M. NELSON (9176)  
VERNICE S. TREASE (5243)  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellee

J. FREDERIC VOROS, JR. (3340)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
UTAH ATTORNEY GENERAL  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellant

FILED  
UTAH APPELLATE COURTS  
AUG 16 2004

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH, :  
Plaintiff/Appellant :  
v. :  
MICHAEL VON FERGUSON : Case No. 20040077-CA  
Defendant/Appellee. :

---

**BRIEF OF APPELLEE**

The State is appealing an interlocutory order reducing a charge of violating a protective order, in violation of Utah Code Ann. § 76-5-108 (1999), from a third degree felony to a Class A misdemeanor in Third District Court in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, Judge, presiding. Appellee is incarcerated.

DEBRA M. NELSON (9176)  
VERNICE S. TREASE (5243)  
**SALT LAKE LEGAL DEFENDER ASSOC.**  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellee

J. FREDERIC VOROS, JR. (3340)  
Assistant Attorney General  
MARK L. SHURTLEFF (4666)  
UTAH ATTORNEY GENERAL  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Appellant

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION .....	1
TEXT OF RELEVANT CONSTITUTIONAL PROVISION .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS .....	3
SUMMARY OF THE ARGUMENT .....	6
ARGUMENT	
POINT I. THE TRIAL COURT CORRECTLY CONCLUDED THAT A PRIOR UNCOUNSELED MISDEMEANOR CONVICTION CANNOT BE USED FOR ENHANCEMENT PURPOSES ABSENT THE STATE SHOWING THAT MR. FERGUSON KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL. ....	7
A. A Presumption of Regularity Does Not Attach When A Conviction Shows On Its Face That A Defendant Was Not Represented By Counsel. ....	8
B. Even If The Court Determines That The Burden Shifted To Mr. Ferguson, He Produced "Some Evidence" That He Was Unrepresented And Did Not Knowingly Waive Counsel. ....	14
POINT II. THE TRIAL COURT CORRECTLY DETERMINED THAT <i>SHELTON</i> DOES NOT STAND FOR THE PROPOSITION THAT A PRIOR CONVICTION IS VALID EVEN THOUGH THE SUSPENDED JAIL SENTENCE IS NOT. ....	23

CONCLUSION ..... 30

Addendum A: Findings of Fact and Conclusions of Law and Order

Addendum B: Sentence, Judgment, Commitment

## TABLE OF AUTHORITIES

### Page

### CASES

<u>Alabama v. Shelton</u> , 535 U.S. 654 (2002) .....	2, 5, 7, 8, 9, 13, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29
<u>Argersinger v. Hamlin</u> , 407 U.S. 25, 92 S.Ct. 2006 (1972) .....	24, 25, 26
<u>Baldasar v. Illinois</u> , 446 U.S. 222, 100 S.Ct. 1585 (1980) .....	10, 11
<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969) .....	18, 19, 20
<u>Burgett v. Texas</u> , 389 U.S. 109 (1967) .....	6, 8, 9, 10, 11, 12, 13, 19, 20, 24, 28, 29
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963) .....	9, 10, 24, 28
<u>Nichols v. United States</u> , 511 U.S. 738 (1994) .....	10, 21, 26, 27, 28
<u>Parke v. Raley</u> , 506 U.S. 20 (1992) .....	16, 17, 18, 20, 22
<u>Scott v. Illinois</u> , 440 U.S. 367, 99 S.Ct. 1158 (1979) .....	25, 26, 29
<u>In re Smith</u> , 925 P.2d 169 (1996) .....	14, 15, 22, 23, 29
<u>State v. Branch</u> , 743 P.2d 1187 (Utah 1987) .....	11, 28
<u>State v. Gomez</u> , 2002 UT 120, 63 P.3d 72 .....	2
<u>State v. Gutierrez</u> , 2003 UT App 95, 68 P.3d 1035 .....	11, 15, 16, 22, 23, 28, 29
<u>State v. Heaton</u> , 958 P.2d 911 (Utah 1998) .....	24
<u>State v. Triptow</u> , 770 P.2d 146 (Utah 1989) .....	6, 8, 10, 11, 12, 13, 14, 16, 23, 28, 29

	<u>Page</u>
<u>Yee v. Escondido</u> , 503 U.S. 519 (1992) .....	25

## STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 76-5-108 (1999) .....	1, 2
Utah Code Ann. § 76-5-203 (Supp. 2000) .....	2
Utah Code Ann. § 76-6-202 (Supp. 2001) .....	2
Utah Code Ann. § 78-2a-3(2)(d) (2002) .....	1
U.S. Const. amend. V .....	17
U.S. Const. amend. VI .....	2, 7, 9, 10, 12, 17, 24, 25, 26, 27, 28, 29
U.S. Const. amend. XIV .....	24
Utah Const. art. I, § 12 .....	24

---

IN THE UTAH COURT OF APPEALS

---

STATE OF UTAH,	:	
Plaintiff/Appellant	:	
v.	:	
MICHAEL VON FERGUSON	:	Case No. 20040077-CA
Defendant/Appellee.	:	

---

**JURISDICTIONAL STATEMENT**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d) (2002). The State is appealing an interlocutory order reducing a charge of violating a protective order, in violation of Utah Code Ann. § 76-5-108 (1999), from a third degree felony to a Class A misdemeanor in Third District Court in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, Judge, presiding. A copy of the Order is in Addendum A.

**STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION**

Issue. Whether the trial court correctly concluded that Mr. Ferguson's prior uncounseled misdemeanor conviction could not be used for purposes of enhancing his current charge because the State failed to sustain its burden to "present[] evidence that the defendant knowingly and voluntarily waived his right to counsel."



Issue. Whether the trial court correctly concluded that Alabama v. Shelton, 535 U.S. 654 (2002) stood for the proposition that Mr. Ferguson had the right to counsel during his prior misdemeanor conviction where he received a suspended jail term, and invalidated the prior uncounseled guilty plea for enhancement purposes.

Standard of Review: These issues involve questions of law which are reviewed for correctness. See State v. Gomez, 2002 UT 120, ¶11, 63 P.3d 72.

### **TEXT OF RELEVANT CONSTITUTIONAL PROVISION**

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **STATEMENT OF THE CASE**

On April 11, 2003, the State charged Mr. Ferguson in an amended information with Attempted Criminal Homicide, Murder, a second degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 2000); Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (Supp. 2001); Theft, a second degree felony, in violation of Utah Code Ann. § 76-5-108 (1999); and Violation of a Protective Order, a third degree felony, in violation of Utah Code Ann. § 76-5-108 (1999). On August 26, 2003, Judge Glenn K. Iwasaki only bound Mr. Ferguson over on the charges of attempted criminal

homicide and violation of a protective order. R. 336:88-89, 90.

Mr. Ferguson filed a motion to quash on October 16, 2003, arguing that the State failed to meet its burden of establishing by "probable cause that Mr. Ferguson committed the crime of violation of a protective order, a third degree felony." R. 33-41. On October 22, 2003, the State filed a memorandum in opposition to the motion to quash. R. 126-136. On October 24, 2003, the trial court held a hearing on Mr. Ferguson's motion to quash the bindover. R. 337. The trial court found that the State had met its burden of probable cause regarding the violation of the protective order charge and denied Mr. Ferguson's motion to quash on count I. R. 287; 337. However, the trial court granted the motion to quash as to count II on the enhancement. R. 287-88; 338.

The State was granted permission to appeal the trial court's interlocutory order on February 18, 2004. R. 329

### **STATEMENT OF THE FACTS**

The preliminary hearing was held on August 26, 2003 before the Honorable Glenn K. Iwasaki. R. 336. The relevant facts were testified to by the State's witnesses at the preliminary hearing.

On January 21, 2003, a protective order was issued prohibiting Mr. Ferguson from having contact with his former girlfriend, Julia Jepson. R. 221-225. The protective order required in part that Mr. Ferguson stay away from Ms. Jepson's place of employment, Brick Yard Kennels. R. 222.

On March 18, 2003, Mr. Ferguson was convicted of violating a protective order, a class A misdemeanor. R. 109-11. The judgment shows that Mr. Ferguson was not represented by counsel and received a suspended jail sentence of 365 days, and placed on probation. R. 110-11. See Addendum B.

On March 24, 2003, Officer Sullivan of the Salt Lake City Police Department saw a Caucasian male whom he later identified as Mr. Ferguson on the roof of the Media Play store in the Brickyard Plaza. R. 336:8-13. The officer subsequently found a rifle with ammunition on the roof and Mr. Ferguson was arrested. R. 336:12. The Media Play store was in the vicinity of the workplace of Ms. Jepson. R. 336:28, 35-36. Mr. Ferguson was arrested and charged with three second degree felonies and one third degree felony: attempted criminal homicide, a second degree felony; burglary, a second degree felony; theft, a second degree felony; and violation of a protective order, a third degree felony. R. 20-23.

During the preliminary hearing, the State introduced into evidence a certified copy of the Judgment, Sentence and Commitment of Mr. Ferguson's prior misdemeanor conviction. R. 336:64. Mr. Ferguson objected to its admission for the purposes of enhancing the violation of a protective order charge because it showed on its face that he was unrepresented. R. 336:65. The trial court bound Mr. Ferguson over on the violation of a protective order, as a third degree felony, and attempted criminal homicide. R. 336:88. The burglary and theft charges were subsequently dismissed at the preliminary

hearing. R. 336:88-89. Mr. Ferguson filed a motion to quash the bindover arguing that his prior uncounseled misdemeanor conviction could not be used to support the enhancement of the violation of a protective order charge to a third degree felony. R. 33-41. The State opposed the motion arguing that the March 18<sup>th</sup> plea could be used for enhancement purposes because Mr. Ferguson was not entitled to counsel for his misdemeanor conviction even though 365 days of jail was imposed because he "was not required to serve a single day in jail as part of his sentence." R. 131-32.

The trial court held a hearing on the motion to quash on October 24, 2003. R. 337. At the hearing, Mr. Ferguson argued that under the recent United States Supreme Court decision Alabama v. Shelton, 535 U.S. 654 (2002), he was entitled to counsel on his misdemeanor conviction because the court imposed a suspended jail sentence. R. 337:8. Mr. Ferguson further argued that because the conviction shows on its face that he was unrepresented he successfully rebutted the presumption of regularity and the burden shifted back to the State to prove he knowingly and voluntarily waived his right to counsel. R. 337:18. The trial court agreed and determined the State had failed to sustain its burden of showing that Mr. Ferguson had knowingly waived his right to counsel and ordered the charge "amended to reflect a class A misdemeanor as opposed to a third degree felony." R. 338:7. The State sought and was granted permission to appeal the trial court's interlocutory order. R. 329.

## **SUMMARY OF THE ARGUMENT**

The trial court correctly found that Mr. Ferguson's prior uncounseled misdemeanor conviction could not be used to enhance his current charge absent a showing by the State that he knowingly waived his right to counsel. Under Burgett v. Texas, 389 U.S. 109 (1967) and State v. Triptow, 770 P.2d 146 (Utah 1989) a presumption of regularity including the presumption that a defendant was represented by counsel does not attach to a prior conviction which shows on its face that a defendant was not represented by counsel and when there is no indication that the right has been waived. Mr. Ferguson's prior conviction shows on its face that he appeared pro se and the record is silent on whether he waived his right to have counsel present. Therefore, the presumption of regularity did not attach to his prior conviction and it cannot be used for enhancement purposes absent a showing by the State that he knowingly waived his right to counsel.

Even if this Court were to determine that a presumption of regularity did attach to the prior conviction, shifting the burden of proof to Mr. Ferguson, he successfully rebutted the presumption by producing "some evidence" that he was unrepresented and did not knowingly waive counsel. Once Mr. Ferguson had produced "some evidence," the burden shifted back to the State to prove that he either was represented or knowingly waived his right to be represented. The State failed to sustain its burden and the trial court correctly concluded that the conviction could not be used for enhancement

purposes.

The trial court found that under Shelton, Mr. Ferguson had the right to counsel unless he validly waived that right. The court correctly concluded that Shelton does not stand for the proposition that a prior conviction is valid even though the suspended jail sentence is invalid. The state in Shelton did not seek review of the validity of Shelton's conviction, therefore, the issue was not before the Supreme Court. Shelton's holding simply confirmed a defendant's Sixth Amendment right to counsel when sentenced to a suspended jail term. The reasoning in Shelton and other Supreme Court and Utah cases supports that an uncounseled conviction cannot be used for enhancement purposes where a defendant has a right to counsel, absent a showing by the State that he knowingly waive that right.

The State failed to sustain its burden in this case, therefore, the trial court correctly found that Mr. Ferguson's prior conviction could not be used for enhancement purposes.

### **ARGUMENT**

**POINT I. THE TRIAL COURT CORRECTLY CONCLUDED THAT A PRIOR UNCOUNSELED MISDEMEANOR CONVICTION CANNOT BE USED FOR ENHANCEMENT PURPOSES ABSENT THE STATE SHOWING THAT MR. FERGUSON KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL.**

The trial court correctly determined that the Sixth Amendment right to counsel attached to the charge of violating a protective order, the class A misdemeanor Mr. Ferguson was convicted of on March 18, 2003 because he was sentenced to a suspended

jail term. See Alabama v. Shelton, 535 U.S. 654 (2002) (clarifying a misdemeanor defendant's right to counsel when sentenced to a suspended jail term). The trial court concluded that Mr. Ferguson's prior conviction could not be used for enhancement purposes absent a showing by the State that he had knowingly waived his right to counsel because the face of the conviction shows he had been deprived of counsel in that proceeding. See Burgett, 389 U.S. at 114-15 (holding certified conviction on its face raised presumption defendant denied right to counsel); Triptow, 770 P.2d 146 (determining when presumption of regularity attaches to a prior conviction). The trial court correctly concluded that the State had the burden to prove Mr. Ferguson knowingly waived his right to counsel because a presumption of regularity did not attach to the misdemeanor conviction which showed on its face that Mr. Ferguson was not represented by counsel. However, even if a presumption of regularity did attach, Mr. Ferguson successfully rebutted the presumption when he presented "some evidence" of irregularity during his prior conviction. Therefore, this Court should affirm the trial court's ruling.

*A. A Presumption of Regularity Does Not Attach When A Conviction Shows On Its Face That A Defendant Was Not Represented By Counsel.*

The supreme court held in Triptow that when a defendant is charged with an enhancement based on a prior conviction "the State bears the burden of proving the prior conviction. . . . A previous judgment of conviction so proven is entitled to a presumption of regularity, including a presumption that the defendant was represented by counsel." 770 P.2d at 149. The presumption of regularity never attached to Mr. Ferguson's prior

conviction because the face of the conviction shows that he was not represented by counsel. See Burgett, 389 U.S. at 114-15 (the face of the prior convictions raised presumption defendant was denied right to counsel); Shelton, 535 U.S. 654 (establishing a misdemeanor defendant's right to counsel when sentenced to a suspended jail term). Therefore, under U.S. Supreme Court and Utah case law, the State had the burden of proving that Mr. Ferguson knowingly and voluntarily waived his right to counsel.

In Burgett, the state offered a certified copy of one of the defendant's prior convictions for the purposes of enhancing his current charge. 389 U.S. at 112. On the face of the conviction it "showed that [the defendant] was not represented by counsel [and] . . . [t]here was no indication in the record that counsel had been waived." Id. The Supreme Court began by stating that the rule established by Gideon v. Wainwright "making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one" was "not limited to prospective applications."<sup>1</sup> Id. at 114.<sup>2</sup> The Supreme Court found that "the certified records of the [prior] conviction on their face raise a presumption that petitioner was denied his right to counsel in the [prior] proceeding, and therefore that his conviction is void." Id. at 114. The Supreme Court

---

<sup>1</sup>In Alabama v. Shelton, the Supreme Court recently held that a misdemeanor defendant sentenced to a suspended jail term has the same right to counsel guaranteed by the Sixth Amendment. 535 U.S. 654.

<sup>2</sup>A felony defendant's right to counsel guaranteed by the Sixth Amendment was recognized in 1963. See Gideon v. Wainwright, 372 U.S. 335 (1963). Burgett does not indicate what year the defendant was convicted of his prior offense in violation of the Sixth Amendment.



reasoned that "[p]resuming waiver of counsel from a silent record is impermissible. To permit a conviction obtained in violation of [the Sixth Amendment] to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of [Gideon]. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Id. at 114-15 (internal citations omitted).

In Triptow, the defendant was convicted of second degree felony theft under the habitual criminal statute which provides for sentence enhancements. 770 P.2d at 146. Defendant argued, *inter alia*, that in addition to proving his previous conviction "the State had the burden of proving that he was represented by counsel when he was previously convicted." Id. Defendant argued that under Baldasar v. Illinois, 446 U.S. 222, 100 S. Ct. 1585 (1980) (overruled by Nichols v. United States, 511 U.S. 738 (1994)) and Burgett, the use of his prior uncounseled convictions for enhancement purposes violated his Sixth Amendment right to the effective assistance of counsel. Id. at 147.

The supreme court began by distinguishing Baldasar and Burgett from Triptow's case by emphasizing that in Baldasar and Burgett "it was plain that the defendant did not have the benefit of counsel during the previous conviction" noting that "the record of the prior conviction on its face raised the presumption that the defendant was denied the right to counsel." Id. & n3. Because of this "obviously uncounseled" conviction, it was unnecessary for the Supreme Court to "reach the question of whether the burden of

pleading and proof on the question of whether the defendant is counseled." Id. at 147-48. Baldasar and Burgett were therefore easily distinguishable because in both cases, the record showed that the defendant did not have counsel. The court then analyzed State v. Branch, 743 P.2d 1187 (Utah 1987) where it "considered a somewhat analogous [burden of proof] question." Id. at 148. The supreme court stated that in Branch it "invoked what was in effect a presumption of the regularity of the proceedings leading to the prior convictions because the defendant had been represented by counsel."<sup>3</sup> Id. (emphasis added). The court applied this same presumption to Triptow concluding that

when a defendant is charged as an habitual criminal, the State bears the burden of proving the prior conviction, sentencing, and commitment . . . . A previous judgment of conviction so proven is entitled to a presumption of regularity, including a presumption that the defendant was represented by counsel. This presumption satisfies any initial burden the State may have of proving that the defendant had or knowingly waived counsel. . . .

Id. at 149<sup>4</sup> (emphasis added). Read together, Burgett and Triptow stand for the proposition that a presumption of regularity only attaches when there is nothing on the face of the conviction to indicate that a defendant was not represented by counsel. Only after the presumption of regularity attaches does the burden of proving that defendant was

---

<sup>3</sup>In Branch, the supreme court stated that "an involuntary guilty plea cannot be used to enhance or support a subsequent conviction." 743 P.2d at 1192. However, the State in Branch "demonstrated that both pleas were entered with the benefit of counsel." Id. Therefore, the presumption of regularity attached and the burden shifted to the defendant to prove that the pleas were involuntary.

<sup>4</sup>This Court reiterated that it is "a plea entered with the benefit of counsel [that] is 'presumed to have been voluntary' absent evidence demonstrating lack of voluntariness." State v. Gutierrez, 2003 UT App 95, ¶8, 68 P.3d 1035 (emphasis added).

not represented by counsel and did not knowingly waive counsel shift to the defendant. Triptow, 770 P.2d at 149. The State acknowledged this burden of proof at the motion to quash hearing. See R. 337:16-17. Hence, the presumption of regularity did not attach in this case because it was obvious from the face of the record that Mr. Ferguson did not have the benefit of counsel and the record is silent on whether he waived his right to counsel.

At the motion to quash hearing, defense counsel pointed out that the face of the conviction showed that Mr. Ferguson appeared "pro se" on March 18, 2003 and pled guilty to the charge of violation of a protective order, a class A misdemeanor. R. 110-111. In addition, the record is silent on whether Mr. Ferguson was advised of his right to counsel and whether he in fact waived that right. R. 110-111; see Burgett 389 U.S. at 114-15 (stating it is impermissible to presume waiver of counsel from a silent record). The State acknowledged that Mr. Ferguson's prior conviction was uncounseled and that Utah case law "seems to say that when that docket says the defendant was pro se, the State then needs to present evidence that he knowingly gave up his right to Counsel." R. 337:16. However the State argued that it was unnecessary to go through this analysis regarding waiver of counsel because the Sixth Amendment right to counsel did not attach during the March 18<sup>th</sup> hearing since Mr. Ferguson was sentenced only to suspended jail sentence. R. 130, 337:16. The following colloquy then took place between the trial court and the State:

THE COURT: Well, I suppose - - would you agree, then, with Ms. Trease, that if this Shelton case stands for the proposition that the jail was imposed, even if it's suspended, a person is entitled to an attorney appointed if they can't afford one, then Mr. Von Ferguson was entitled to an attorney before Judge Medley and one wasn't appointed, or if there isn't some proof that he knowingly waived that right, then he would be entitled only to have the charges Class A misdemeanor?

THE STATE: Absolutely. He (inaudible) a full year suspended on him.

THE COURT: Yes.

THE STATE: If the (inaudible) jail, whether suspended or not, that the State would need to come and prove that he willingly waived his right to Counsel.

R. 337:16-17

As the record indicates, the state agreed with the trial court that if Shelton stood for the proposition that a defendant is entitled to the appointment of an attorney when a suspended jail sentence is imposed then it would have the burden to "prove that he willingly waived his right to Counsel." R. 337:17.

In sum, under Triptow, the presumption of regularity including the "presumption that defendant was represented by counsel" does not attach because, like the record of conviction in Burgett, it was plain from the face of the conviction that Mr. Ferguson "did not have the benefit of counsel during his previous conviction" and there is no indication from the record of conviction that he was advised or waived his right to counsel.

Triptow, 770 P.2d at 147; Burgett, 389 U.S. at 114-15. Because the presumption of regularity never attached, the trial court correctly determined that the State was not relieved of its burden of proving that Mr. Ferguson had or knowingly waived counsel.

The State failed to sustain its burden of proof, therefore, the trial court correctly determined that Mr. Ferguson's uncounseled misdemeanor plea could not be used to enhance the current charge against him. Therefore, this Court should affirm the trial court's ruling.

*B. Even If The Court Determines That The Burden Shifted To Mr. Ferguson, He Produced "Some Evidence" That He Was Unrepresented and Did Not Knowingly Waive Counsel.*

After the State satisfies its initial burden, a presumption of regularity attaches and the burden shifts to the defendant to "produce some evidence that he or she was not represented by counsel and did not knowingly waive counsel." Triptow, 770 P.2d at 149 (emphasis added). Even if this Court determines that the State satisfied its initial burden and a presumption of regularity attached, Mr. Ferguson successfully rebutted the presumption thereby shifting the burden back to the State.

"[W]hen a defendant has offered evidence of a denial of right to counsel in the absence of a knowing waiver, 'the presumption of regularity is rebutted and the burden shifts to the State to prove by a preponderance of the evidence that the defendant was in fact represented or knowingly waived representation'" In re Smith, 925 P.2d 169, 173 (1996) (quoting Triptow, 770 P.2d at 149. In re Smith, a case the State fails to acknowledge in its opening brief, the supreme court determined that the appellant, Smith, had successfully rebutted the presumption of regularity shifting the burden back to the State to prove that the appellant knowingly waived his right to counsel. 925 P.2d at 173.

Smith appealed "from a summary judgment that his Wisconsin convictions . . . subject him to disciplinary action by the Utah State Bar." Id. at 170. During proceedings in the trial court, the prosecutor introduced a copy of Smith's previous Wisconsin conviction. Id. at 172. Smith argued that his Wisconsin conviction was void and "not eligible for full faith and credit in Utah" because he was denied the right to counsel. Id. The supreme court indicated that, in this case, the introduction of the previous conviction shifted the burden to Smith to "produce some evidence that he . . . was not represented by counsel and did not knowingly waive counsel." Id. In his "attempt[] to do this," Smith pointed to the record which indicated that "his original counsel withdrew." Id. The record also indicated that after granting several continuances allowing for Smith to retain new counsel "the court refused to further delay the trial and required him to proceed on his own." Id. at 173. After Smith presented this evidence, the supreme court indicates that the burden shifted back to the State to show that Smith "was in fact represented or knowingly waived representation." Id. at 173. In re Smith, "the prosecution met its burden of showing that Smith knowingly waived his right to counsel" based on the facts in the record surrounding the Wisconsin conviction. Id.

In Gutierrez, the defendant was charged with driving under the influence of alcohol and/or drugs (DUI) with prior convictions enhancing the DUI charge from a class B misdemeanor to a third degree felony. 2003 UT App 95 at ¶2. Gutierrez filed a motion to dismiss the enhancement arguing that he was denied the assistance of counsel during

his prior misdemeanor guilty pleas. Id. In an effort to rebut the presumption of regularity that attached to the prior guilty plea, Gutierrez produced only a "self-serving affidavit" where he claimed, *inter alia*, that the judge did not inform him of his right to counsel. Id. at ¶¶9-10. This Court determined that a self-serving affidavit was insufficient "to overcome the presumption of regularity established in Triptow," stating "[a] defendant must demonstrate the involuntariness of his plea by some evidentiary method other than his own bare assertions." Id. at ¶12. Instead, "a defendant seeking to rebut the presumption of regularity must produce a transcript, testimony regarding taking of the plea, a docket sheet, or other affirmative evidence." Id. at ¶11.

In this case, a certified copy of Judgment, Sentence and Commitment of Mr. Ferguson's prior conviction was submitted as evidence to the trial court. R. 336:64. Mr. Ferguson pointed out that his prior conviction clearly identifies that he appeared "pro se" and was unrepresented by counsel during the March 18<sup>th</sup> guilty plea and sentencing hearing. R. 336:65. The conviction also did not contain any notations or make reference to whether Mr. Ferguson was advised of or waived his right to counsel. R. 110-11. Therefore, Mr. Ferguson produced "some evidence" rebutting the presumption of regularity.

The State cites Parke v. Raley, 506 U.S. 20 (1992), as support for its argument that a presumption of regularity is not rebutted by evidence specifically indicating that a defendant appeared pro se or from a record silent on the issue of whether a defendant was

advised or waived his right to counsel. See Appellant Brief 15-16. However Parke does not stand for such a broad proposition. Parke concerned the "narrow question" of whether Kentucky's burden of proof scheme, violated due process.<sup>5</sup> Id. at 28. The defendant was charged "with robbery and with being a persistent felony offender in the first degree." Id. at 23. The state presented certified copies of the defendant's two prior convictions for burglary. Id. at 24. In addition, the state presented evidence consisting of a "Plea of Guilty" form signed by the defendant and his attorney in one of the prior convictions. Id. (emphasis added). The defendant also "acknowledged signing a form [in the second conviction] that specified the charges to which he agreed to plead guilty . . . [and] admitted that the judge had at least advised him of his right to a jury trial." Id. at 25. The defendant moved to suppress these prior convictions arguing that "imposing even a burden of production on him is fundamentally unfair" when a waiver of his Fifth and Sixth Amendment rights are in question. Id. at 31. The defendant further argued that because there were no transcripts of the plea proceedings in the record, the record could not affirmatively show that his guilty pleas were knowing and voluntary. Id. at 23.

---

<sup>5</sup>Under Kentucky's recidivism statute the state must "prove only the fact of a previous conviction . . . not [whether] that . . . conviction was validly obtained." Id. at 523. "Once this is done, a presumption of regularity attaches, and the burden shifts to the defendant to produce evidence that his rights were infringed or some procedural irregularity occurred in the earlier proceeding. If the defendant refutes the presumption of regularity, the burden shifts back to the government affirmatively to show that the underlying judgment was entered in a manner that did, in fact, protect the defendant's rights." Id. at 24.



While the Supreme Court acknowledged that recidivism statutes "have a long tradition in this country" and have been "repeatedly upheld," the Court also noted that "uncounseled convictions cannot be used 'against a person either to support guilt or enhance punishment for another offense.'" Id. at 26-27. Furthermore, "[i]t is beyond dispute that a guilty plea must be both knowing and voluntary." Id. at 28. "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Id. at 29 (citation omitted). However, a presumption of regularity attaches to final judgments and the Court determined "[t]here [was] no good reason to suspend the presumption" in the Parke case because he had counsel. Id. at 30. The reasoning behind the Court's determination was that Parke was not a case where the actual "transcript [was] suspiciously 'silent' on the question whether the defendant waived constitutional rights." Id. Rather, there were no actual transcripts or records at all of the prior plea colloquies which apparently is not unusual "when the prior conviction is several years old." Id. Because "Boykin"<sup>6</sup> colloquies have been required for nearly a quarter century" the Supreme Court did not think it was logical to conclude when collaterally reviewing a conviction that the "mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) [presumptively meant] that the defendant was not advised of his rights." Id.

---

<sup>6</sup>See Boykin v. Alabama, 395 U.S. 238 (1969).

The defendant then tried to argue that Burgett stood for the proposition that "every previous conviction used to enhance punishment is 'presumptively void' if waiver of a claimed constitutional right does not appear from the face of the record." Id. at 31. The Supreme Court distinguished Burgett in two ways. First, the Court noted that at the time of Burgett's previous conviction "state criminal defendants' federal constitutional right to counsel had not yet been recognized, and so it was reasonable to presume that the defendant had not waived a right he did not possess." Id. However, the Supreme Court noted that the Boykin rules have now been required for almost a quarter century. Id. at 30. In addition, the record was not silent on the matter of waiver as it was in Burgett; but instead the record did not exist at all. Id. "If raising a Boykin claim and pointing to a missing record suffices to place the entire burden of proof on the government, the prosecution will not infrequently be forced to expend considerable effort and expense attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable. . . .[Therefore], [i]n light of the relative positions of the defendant and the prosecution in recidivism proceedings, we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant."<sup>7</sup> Id. at 32. "We have little doubt that serious practical difficulties will confront any party assigned an

---

<sup>7</sup>The Supreme Court noted that states can and do allocate the burdens of proof differently. Id. at 32. Some states place the entire burden on the prosecution while others assign the entire burden to defendants after the state has established the fact of the conviction. Id. at 33.

evidentiary burden in such circumstances" but "[t]he Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused." Id. The Supreme Court held that Kentucky's allocation of the burden of production to the defendant did not violate due process. Id. at 34.

As indicated, Parke concerned the allocation of burdens and does not stand for the proposition that the presumption of regularity is not rebutted by evidence specifically indicating that a defendant appeared pro se or from a record silent on the issue of whether a defendant was advised or waived his right to counsel. In fact, the Supreme Court's rationale in distinguishing Burgett bolsters Mr. Ferguson's argument that a presumption of regularity never attached to his prior conviction. See supra Point A. The Supreme Court distinguished Burgett from the Parke case because missing records of a plea colloquy are not the same as records that are silent on whether a defendant waived constitutional rights. Moreover, unlike Parke where the Boykin rule had been well-established for nearly a quarter century, at the time of Burgett's prior conviction "state criminal defendants' federal constitutional right to counsel had not yet been recognized, and so it was reasonable to presume that the defendant had not waived a right he did not possess." Id. at 31. The State interprets this to mean that because Shelton, which established a misdemeanor defendant's right to counsel when given a suspended sentence, was decided 10 months before Mr. Ferguson pled guilty on March 18, 2003, it should be

presumed "he enjoyed the right to counsel." See Appellant's Brief 16. A simple review of the trial court record illustrates that far from enjoying a "well-established" right to counsel, Shelton's rule was unknown to both the State and the trial court.

During the preliminary hearing, the State sought to introduce into evidence Mr. Ferguson's March 18<sup>th</sup> prior uncounseled guilty plea. The defendant objected arguing that the document shows on its face that Mr. Ferguson appeared pro se, therefore this "unrepresented conviction may not be used" for enhancement purposes. R. 336:64-65. The State responded that it had researched the matter and found the that "[t]he law in Utah is to the contrary." R. 336:65. Mr. Ferguson then filed a motion to quash arguing again that his prior uncounseled conviction could not be used to support an enhancement. R. 336-41. The State responded, arguing that the prior uncounseled conviction could be used for enhancement purposes "[b]ecause the Defendant is not entitled to counsel for a misdemeanor conviction unless his sentence included jail." R. 130-135. The district court held a hearing on the motion. R. 337. During the hearing, Mr. Ferguson argued that under Shelton he was "entitled to an attorney if a jail sentence is imposed . . . and suspended." R. 337:8-9. The State was not aware of the Shelton holding stating "[m]y research pulled up Nichols, and that was the most recent case that I had found." R. 337:14-15. Therefore, the State argued that because Mr. Ferguson's jail term was suspended he was not entitled to counsel. R. 337:15-17. The court took the matter under advisement stating it would "like an opportunity to read the Shel[t]on case." R. 337:19.

The court then stated "[b]ecause I also agree that before the State would have to show that Mr. Ferguson waived his right to Counsel, there would have to be some showing that he's entitled to Counsel. If he wasn't entitled to Counsel before Judge Medley, then the State wouldn't have to show that he waived it, but I think that that very well may be, Ms. Cook, that if jail sentence was imposed and suspended under Utah law, he may be entitled to Counsel." R. 337:20.

The record shows that neither the trial court nor the State were aware of a defendant's right to counsel unless he was actually sentenced to a term of imprisonment. Because the record affirmatively shows that the court and State were unaware that the Shelton case existed, this Court should not "presume" that the plea taking court complied with Shelton. Moreover, if Parke were to be interpreted to mean that despite an explicit notation on the conviction that defendant appeared pro se and silence on whether he waived his right to counsel it should nevertheless be "presumed [the court] compl[ied] with all legal requirements" then it would in effect create an irrebuttable presumption. Absent a specific notation on the docket or conviction that the justice court judge did not advise a defendant of his right to counsel it would be virtually impossible to rebut the presumption of regularity. However, this Court has determined that a defendant need only come forward with "some evidence" to rebut the presumption of regularity.

Under the supreme court's analysis in In re Smith and this Court's analysis in Gutierrez, a copy of the Judgment, Sentence and Commitment explicitly stating Mr.

Ferguson appeared pro se and the lack of any notation that he was advised of his right or waived it is enough to rebut the presumption of regularity on a prior conviction. See In re Smith, 925 P.2d at 172-73 (finding appellant had successfully rebutted the presumption of regularity shifting the burden back onto the State to prove right to counsel was validly waived); Gutierrez, 2003 UT App 95 at ¶7 (to rebut presumption of regularity defendant must produce "some evidence" he was not represented and did not knowingly waive counsel); Triptow, 770 P.2d at 149 (same). Once Mr. Ferguson had produced "some evidence" by way of the Judgment, Sentence, Conviction, the burden shifted back to the State to "prove by a preponderance of the evidence that the defendant was in fact represented or knowingly waived representation." Id. The State failed to prove its burden and the trial court correctly concluded that Mr. Ferguson's prior conviction could not be used for enhancement purposes. R. 338:6.

Therefore, this Court should affirm the trial court's ruling striking the enhancement to the charge of violation of a protective order.

POINT II. THE TRIAL COURT CORRECTLY DETERMINED THAT SHELTON DOES NOT STAND FOR THE PROPOSITION THAT A PRIOR CONVICTION IS VALID EVEN THOUGH THE SUSPENDED JAIL SENTENCE IS NOT.

The trial court determined that under Shelton, Mr. Ferguson was entitled to counsel when sentenced to a suspended jail term on his prior misdemeanor conviction. R. 288; 338:6. The court disagreed with the State's argument that despite the fact that Mr. Ferguson had the right to an attorney during his prior conviction, "Shelton only

invalidates the jail sentence given pursuant to an uncounseled misdemeanor conviction, and does not impact the conviction itself." Appellant Brief 9; R. 288. The State contends that the trial court erred in rejecting its interpretation. The State argues that because the Supreme Court only invalidated Shelton's sentence, the case necessarily means that the conviction is valid and can be used for enhancement purposes. However, the State's interpretation of Shelton is too broad and ignores the Supreme Court's reasoning and case precedence disallowing the use of uncounseled convictions in violation of the Sixth Amendment for enhancement purposes.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI; see also Utah Const. art. I, §12. In Gideon, 372 U.S. at 335, the Supreme Court "established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth [Amendment], making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one." Burgett 389 U.S. at 114; State v. Heaton, 958 P.2d 911, 917 (Utah 1998). In Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972), the Supreme Court clarified its holding in Gideon that absent a knowing and intelligent waiver the Sixth Amendment right to counsel is violated when a defendant is "imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel." Id. at 37. "Under [this] rule . . . every judge will know when the trial of a

misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." Id. at 40; see also Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158 (1979) (holding that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"). The Supreme Court's recent holding in Shelton simply reiterated the importance of the right to counsel, and clarified that such right attaches to a misdemeanor defendant any time an actual or suspended jail sentence is imposed. Shelton, 535 U.S. at 672.

In Shelton, Alabama only sought review of the Alabama Supreme Court's invalidation of the defendant's suspended sentence but did not challenge the state court's affirmation of the defendant's conviction. Id. "The framing of the question presented has significant consequences, . . . , because under [the Supreme] Court's Rule 14.1(a), 'only the questions set forth in the petition, or fairly included therein, will be considered by the Court. . . .'" "[W]e ordinarily do not consider questions outside those presented in the petition for certiorari." Yee v. Escondido, 503 U.S. 519, 535 (1992). Therefore, the Supreme Court "confine[d] its review" only to determining whether "the Sixth Amendment right to appointed counsel, as delineated in Argersinger and Scott, applies to a defendant" who is sentenced to a suspended jail term for a misdemeanor conviction. Id. at 658. "Satisfied that Shelton [was] entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime [was] decided and his vulnerability to



imprisonment determined" [Id. at 674], the Supreme Court held that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." Id. at 658 (quoting Argersinger, 407 U.S. at 40). Far from the State's contention that the Court's failure to address Shelton's underlying conviction means that it is valid, the Supreme Court's reasoning in Shelton and prior case law show that a misdemeanor conviction taken in violation of the Sixth Amendment is invalid.

Similar to the State's attempts in this case, amicus in Shelton attempted to align its case with Nichols v. U.S., 511 U.S. 738 (1994). The Shelton Court began distinguishing Nichols' on its facts. 535 U.S. at 663. The question presented in Nichols was "whether the Sixth Amendment barred consideration of a defendant's prior uncounseled misdemeanor conviction in determining his sentence for a subsequent felony offense." Id. During Nichols' prior uncounseled conviction he was "fined but not incarcerated" for driving under the influence. Id. (emphasis added). The Nichols' Court held that "'an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.'" Id. (quoting Nichols, 511 U.S. at 749) (emphasis added). A conviction validly imposed under Scott is one in which a defendant is not sentenced to a term of imprisonment unless afforded the right to the assistance of appointed counsel. See Scott, 440 U.S. at 374. The

Shelton Court reasoned that because Nichols' uncounseled misdemeanor conviction was "valid when imposed," since he was only fined and not incarcerated, it "did not later become invalid because it was used to enhance." Id. at 664. The Court also reasoned that in Nichols it applied "a 'less exacting' standard 'consistent with the traditional understanding of the sentencing process" where past criminal conduct can be considered. Id. at 665. However, "[t]hat relaxed standard has no application in [a] case, where the question is whether the defendant may be jailed absent a conviction credited as reliable because the defendant had access to 'the guiding hand of counsel.'" Id. (emphasis added) (citations omitted). This distinction is relevant in Mr. Ferguson's case because his prior conviction cannot be "credited as reliable" absent a showing that he waived his right to "the guiding hand of counsel."

Finally, in rejecting the amicus' argument that appointment of counsel should only be required at "the probation revocation stage, when incarceration is imminent," the Court's reasoning further suggests that a prior uncounseled conviction is in fact invalid when a suspended sentence is imposed without the assistance of counsel.

We think it plain that a hearing so timed and structured cannot compensate for the absence of trial counsel, for it does not even address the key Sixth Amendment inquiry: whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration. Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing.'

Id. at 667.

This reasoning demonstrates that a conviction obtained in violation of the Sixth Amendment is not reliable or valid because it "has never been subjected to 'the crucible of meaningful adversarial testing.'" Id. This conclusion is in line with precedent from other U.S. Supreme Court and Utah case law establishing that a conviction obtained in violation of the Sixth Amendment right to counsel cannot be used to enhance or support a subsequent conviction. Burgett, 389 U.S. 109; Nichols, 511 U.S. at 743 n9; Branch, 743 P.2d at 1192 (citation omitted); Triptow, 770 P.2d 146; Gutierrez, 2003 UT App 95 at ¶7. The Supreme Court has already determined that "[t]o permit a conviction obtained in violation of [the Sixth Amendment right to counsel] to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of [Gideon]. Burgett, 389 U.S. at 115 (internal citation omitted); see Shelton, 535 U.S. 654 (establishing the same Sixth Amendment principle for misdemeanor defendants when sentenced to a suspended jail term).<sup>8</sup> "Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Id.

The Shelton holding simply confirmed a defendant's Sixth Amendment right to

---

<sup>8</sup>The State attempts to draw a distinction between felony and misdemeanor right to counsel cases, however, Shelton's holding affirming a misdemeanor defendant's same Sixth Amendment right to counsel when sentenced to a suspended sentence makes such a distinction erroneous.

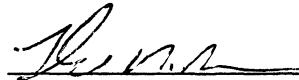
counsel when sentenced to a suspended jail term. An uncounseled conviction, regardless of whether it is for a misdemeanor with a suspended sentence or a felony, cannot be used for enhancement purposes where a defendant has a right to counsel absent a showing that he knowingly and voluntarily waived that right. Such a conviction is invalid under Scott and unreliable for enhancement purposes because it "has never been subjected to 'the crucible of meaningful adversarial testing.'" Shelton, 535 U.S. at 667.

Furthermore, under Burgett and Triptow, the conviction the State submitted was not entitled to "a presumption of regularity" including "a presumption that [Mr. Ferguson] was represented by counsel" because the face of the conviction indicated that Mr. Ferguson did not enter his plea with the benefit of the guiding hand of counsel but appeared pro se. The conviction was also silent on whether he waived his right to counsel. Burgett, 389 U.S. at 114-15; Triptow, 770 P.2d at 149; Gutierrez, 2003 UT App 95 at ¶8. Therefore, the presumption never attached. If despite this obvious irregularity, the Court concludes that the State was still entitled to the presumption, Mr. Ferguson presented some evidence that he did not have counsel and did not knowingly waive counsel, shifting the burden back to the State. In re Smith, 925 P.2d at 173; Triptow, 770 P.2d at 149; Gutierrez, 2003 UT App 95 at ¶7. It then became the State's burden to show by a preponderance of the evidence that he knowingly and voluntarily waived his Sixth Amendment right. The trial court correctly concluded that the State had failed to sustain its burden and struck the enhancement.

### CONCLUSION

For the reasons set forth herein, Mr. Ferguson respectfully requests that this Court affirm the trial court's ruling.

SUBMITTED this 16<sup>th</sup> day of August, 2004.



---

DEBRA M. NELSON  
Attorney for Defendant/Appellant

---

VERNICE S. TREASE  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 16<sup>th</sup> day of August, 2004.

  
DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this \_\_\_\_ day of August, 2004.

\_\_\_\_\_

## ADDENDA

## ADDENDUM A



DAVID E. YOCOM  
District Attorney for Salt Lake County  
B. KENT MORGAN, Bar No. 3945  
ALICIA H. COOK, Bar No. 8851  
Deputy District Attorney  
231 East 400 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 363-7900

FILED  
JAN 3 2004  
SALT LAKE CITY  
By [Signature] Deputy Clerk

---

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

---

THE STATE OF UTAH,	)	
	)	FINDINGS OF FACT AND CONCLUSIONS
Plaintiff,	)	OF LAW AND ORDER
	)	
-vs-	)	Case No. 031902097
	)	
MICHAEL VON FERGUSON,	)	Judge ROBIN W. REESE
	)	
Defendant.	)	

---

The Defendant's Motion to Quash the Bindover having come before this Court for hearing in the above entitled matter on October 24<sup>th</sup>, 2003, and November 3<sup>rd</sup>, 2003, in which Defendant was represented by counsel, Vernice Trease, and the State was represented by counsel, B. Kent Morgan and Alicia H. Cook, the Court having fully considered the written memoranda and oral arguments of counsel, this Court now enters its FINDINGS OF FACT and CONCLUSIONS OF LAW and ORDER.

**FINDINGS OF FACT**

1. On March 18<sup>th</sup>, 2003, the defendant pled guilty to violating a protective order, a class A misdemeanor, before Judge Medley in District Court case number 031901111, and was sentenced to 365 days in jail. The defendant was not

represented by counsel when he entered his plea. The jail sentence was suspended in its entirety and the defendant was placed on probation.

2. On March 26<sup>th</sup>, 2003, the State filed an information alleging that the defendant had committed Attempted Homicide, Violation of a Protective Order, Burglary, and Theft of a Firearm. The protective order violation was enhanced to a third degree felony based on the defendant's prior conviction in case number 031901111.
3. A preliminary hearing was held on August 26<sup>th</sup>, 2003, before Judge Iwasaki. The State presented evidence that the defendant, while carrying a loaded rifle, had climbed onto the roof of a building neighboring the victim's workplace. The State also offered a certified copy of the prior conviction to support the enhanced protective order violation. Defense counsel objected to the use of the prior conviction, and argued that an uncounseled plea could not be used to enhance a subsequent offense. The Court overruled the objection and at the conclusion of the hearing found sufficient probable cause to bind over the Attempted Homicide and Protective Order Violation charges.
4. On October 16<sup>th</sup>, 2003, counsel for the defense filed a Motion to Quash the Bindover. The defense argued that the defendant's prior uncounseled misdemeanor conviction could not be used to enhance the subsequent offense, and urged the Court to strike the enhancement. The defense also argued that the evidence presented at the preliminary hearing failed to establish that the defendant had actually violated the protective order.

5. This Court heard oral arguments on October 24<sup>th</sup>, 2003. At the conclusion of the arguments, the Court requested that counsel brief the application of Alabama v. Shelton to the instant case, and scheduled further arguments for November 3<sup>rd</sup>, 2003.
6. During the November 3<sup>rd</sup> hearing, counsel for the State argued that Shelton prohibits the imposition of a suspended jail sentence given to a misdemeanor defendant who did not have counsel, but does not invalidate the underlying conviction for purposes of enhancing future crimes. Counsel for the defendant argued that, whenever a suspended jail sentence is given to a misdemeanor defendant, Shelton does not permit the use of that conviction for enhancement.

#### **CONCLUSIONS OF LAW**

1. The defense's motion to quash the bindover for insufficient evidence is denied. The State met its burden at the preliminary hearing of showing probable cause regarding the Violation of a Protective Order charge. The defendant's efforts to commit homicide against the victim also constitute a violation of the protective order, which prohibits the defendant from committing or attempting to commit acts of violence against the victim.
2. The defense's motion to quash the bindover of count II as a third degree felony is granted. The Court agrees with the defense that under Alabama v. Shelton, a defendant facing a misdemeanor charge is entitled to counsel when a jail sentence is rendered, regardless of whether the sentence is suspended or actually imposed. Defendant Ferguson did not have counsel at the time he entered his guilty plea

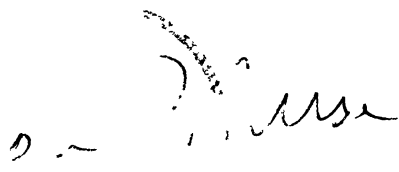
and received a suspended sentence, therefore the prior conviction cannot be used to enhance count II unless the State presents evidence that the defendant knowingly and voluntarily waived his right to counsel. The Court disagrees with the State's argument that Shelton only invalidates the jail sentence given pursuant to an uncounselled misdemeanor conviction, and does not impact the conviction itself.

### ORDER

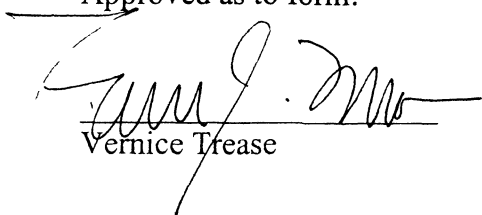
IT IS HEREBY ORDERED that the enhancement to count II is stricken, and count II stands as a class A misdemeanor.

DATED this 21 day of January, 2004.

BY THE COURT:

  
\_\_\_\_\_  
Judge ROBIN W. REESE

Approved as to form:

  
\_\_\_\_\_  
Vernice Trease

## ADDENDUM B

3RD DISTRICT COURT - SALT LAKE COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

SOUTH SALT LAKE,	:	MINUTES
Plaintiff,	:	CHANGE OF PLEA
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 031901111 MO
	:	
MICHAEL FERGUSON,	:	Judge: TYRONE E MEDLEY
Defendant.	:	Date: March 18, 2003

---

## PRESENT

Clerk: tinaa  
Prosecutor: FROST, JANICE L  
Defendant  
Defendant pro se

## DEFENDANT INFORMATION

Date of birth: February 3, 1955  
Video  
Tape Number: 9.21

## CHARGES

1. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor  
Plea: Guilty - Disposition: 03/18/2003 {Guilty Plea}

## CHANGE OF PLEA

## SENTENCE JAIL

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 365 day(s).

Credit is granted for time served.

Case No: 031901111  
Date: Mar 18, 2003

---

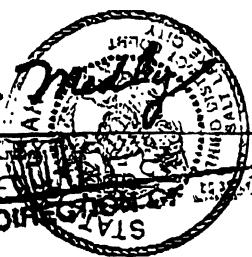
## PROBATION CONDITIONS

Violate no laws.

Defendant is not to commit any other violations. Complete LDS  
substance abuse program by 4/14/03. Fine to be paid by 7/1/03.

Dated this 18 day of March, 20 03.

*Tyrene E. Medley*  
TYRONE E MEDLEY  
District Court  
BY                       
STAMP USED AT DIRECTOR'S OFFICE



I CERTIFY THAT THIS IS A TRUE COPY OF AN  
ORIGINAL DOCUMENT ON FILE IN THE THIRD  
DISTRICT COURT, SALT LAKE COUNTY, STATE  
OF UTAH.

DATE:                     

DEPUTY COURT CLERK

